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Supreme Court of the United States

October Term, 1945.

No. 735

JOHN D. LYON,

Petitioner.

JEROME K. HARKNESS,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

RESPONDENT'S STATEMENT OPPOSING
JURISDICTION

FRANK B. KEVINSON,

Attorney General,

Washington, D. C.

Presented by

Attorney General

Charles E. Smith

Of Counsel

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OCTOBER TERM, 1945.

No. 736

JOHN D. LYON,
Petitioner,

v.

JEROME K. HARKNESS,
Respondent.

PETITION FOR WRIT OF CERTIORARI RESPONDENT'S STATEMENT OPPOSING JURISDICTION

Pursuant to paragraph 3 of Rule 38 of the Rules of the Supreme Court of the United States, comes now Jerome K. Harkness, respondent, in the above entitled case and presents the following matter making against the exercise of jurisdiction of the Supreme Court of the United States as asserted in petition for writ of *certiorari* and brief in support thereof filed by the petitioner on January 14, 1946.

Opinions Below

The opinion of the District Court for the District of New Hampshire in this case will be found in 58 Fed. Supp. 746 and in the Transcript of Record, page 53.

The opinion of the Circuit Court of Appeals for the First Circuit affirming the order of the District Court will be found in 151 F. (2d) 731.

Jurisdiction

The jurisdiction of this Court is invoked by petitioner under the provisions of 28 U.S.C.A. s. 347 (a).

Statement of the Case

This case involves *habeas corpus* proceedings initiated in the Federal District Court of New Hampshire by which the petitioner sought to secure his release from custody imposed upon him by virtue of a warrant issued by the Governor of New Hampshire in extradition proceedings honoring the request of the Governor of Massachusetts that the petitioner be returned to Massachusetts to answer six counts of an indictment for nonsupport, desertion, and abandonment of his wife and two minor children.

The petitioner, who had obtained a Nevada divorce eight days prior to the Massachusetts indictment, alleged that he was being held in violation of rights guaranteed to him by the *Full Faith and Credit* clause of the Federal Constitution.

The District Court found that the petitioner had made no application for any judicial remedy afforded by the state, that no good reason appeared for his failure to do so and that no exceptional circumstances of peculiar urgency existed to justify a departure from the rule requiring the exhaustion of judicial remedies afforded by the state courts. (R. 54-55).

Upon motion made by respondent the District Court ordered that the writ be discharged and the petitioner remanded to the custody of the respondent.

On appeal the Circuit Court of Appeals for the First Circuit affirmed the order of the District Court on the ground that, although the District Court has jurisdiction of *habeas corpus* proceedings wherein a petitioner alleges that he is being held in state custody in violation of federal rights, such court is under no duty to exercise this jurisdiction and will not ordinarily do so until all available state remedies have been exhausted.

Argument

It is Submitted that Certiorari Should be Denied on the Following Grounds:

A. The petitioner in giving the reasons relied upon for the granting of *certiorari* does not allege that the decision of the Circuit Court of Appeals for the First Circuit in this case is in conflict with any decision of any other Circuit Court of Appeals on the question whether available judicial state remedies ought to be exhausted in *habeas corpus* proceedings before having recourse to the federal courts. No such conflict appears to exist.

B. It is now well settled in the Federal Courts that prior exhaustion of state judicial remedies is required in *habeas corpus* proceedings. *White v. Ragen*, 324 U. S. 760, 89 L.Ed. 932, 65 S.Ct. 978. *House v. Mayo*, 324 U.S. 42, 89 L.Ed. 528, 65 S.Ct. 517. *Ex parte Hawk*, 321 U.S. 114, 88 L.Ed. 574, 64 S.Ct. 448 (1944). *Wilson v. Lanagan* (1938, C.C.A. 1st), 99 F. (2d) 544 (*certiorari* denied in (1939) 306 U.S. 634, 85 L.Ed. 1035, 59 S.Ct. 486).

C. The petitioner has not alleged any reasons of the character described in subdivision (b) paragraph 5 of Rule 38 of the Rules of the United States Supreme Court, which, although not controlling, are generally considered as justifying review on writ of *certiorari* of decisions of Circuit Courts of Appeals.

D. Most of the petitioner's contentions outlined in his petition and brief go to the merits of the controversy relating to the lawfulness or unlawfulness of his detention and to his guilt or innocence of nonsupport. The procedural issue whether the *proper judicial forum* for a hearing on his application for *habeas corpus* at this stage of the proceedings is the federal or state courts is not met with any degree of clearness.

E. The judicial remedy of *habeas corpus* was available to the petitioner in the New Hampshire state courts. The New Hampshire Constitution, Part Second, Art. 91, provides:

"Art. 91. The privilege and benefit of the *habeas corpus*,

shall be enjoyed in this state, in the most free, easy, cheap, expeditious, and ample manner, and shall not be suspended by the legislature, except upon the most urgent and pressing occasions, and for a time not exceeding three months."

To implement this constitutional guaranty the New Hampshire Legislature years ago enacted an *habeas corpus* act (R.L. (1942) c. 406), to which the petitioner could have resorted for relief. In addition to this general act, section 10 of chapter 437 of the Revised Laws (1942) of New Hampshire provides more specially for the *habeas corpus* remedy in extradition cases by application for a writ before a judge of a court of record. That section provides:

"10. Rights of Accused Person; Application for Writ of Habeas Corpus. No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he shall first be taken forthwith before a judge of a court of record in this state, who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel; and if the prisoner or his counsel shall state that he or they desire to test the legality of his arrest, the judge of such court of record shall fix a reasonable time to be allowed him within which to apply for a writ of *habeas corpus*. When such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and to the said agent of the demanding state."

Conclusion

The rule is that there has not been an exhaustion of state judicial remedies so as to entitle the petitioner to *habeas corpus* in a federal court, where *habeas corpus* was available in the state courts, but has not been sought or carried to a conclusion.

Mooney v. Holohan, 294 U.S. 103, 79 L.Ed. 791, 55 S.Ct. 340, 98 A.L.R. 406.

In *Waley v. Johnston*, 316 U.S. 101, 104, 105, 86 L.Ed. 1302, 1304, 1305, 62 S.Ct. 964, it was pointed out that the writ is an appropriate remedy in the federal courts in "those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused and where the writ is the only effective means of preserving his rights." In the case at bar no justification has been shown to exist for cutting short the state corrective processes in favor of interference by a federal court. The writ of *habeas corpus* is an extraordinary remedy which the federal courts in their discretion will not apply if no rights under federal law or the Constitution have been violated. Even if such violations exist, the federal courts will not exercise their power unless the state remedies have been exhausted, save in very rare circumstances of pressing urgency not present here.

It is respectfully submitted that the petitioner's petition for *certiorari* be denied.

Respectfully submitted,

FRANK R. KENISON,
Attorney General,
Concord, New Hampshire.

ERNEST R. D'AMOURS
Assistant Attorney-General
Concord, New Hampshire
Of Counsel.